No. 11551

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director
Immigration and Naturalization
Service, Seattle, Washington,

Appellant,

vs.

CHI YAN CHAM LOUIE,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

J. CHARLES DENNIS
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REPLY BRIEF OF APPELLANT

Appellee neither cites authority upon nor argues the only question on this appeal, but her counsel contents himself with a discussion of the Immigration laws, the Treaty with China, and cases involving only the rights of Chinese lawfully admitted to this country under the Treaty to be and remain in this country free from *deportation.* That question is in no sense

involved in this case, as appellee's deportation is not sought.

As stated in our opening brief, the sole and only question in this case is: Is a "non-immigrant" Chinese, admitted to this country in 1927 under the Treaty of 1880 with China, as the daughter of a Chinese merchant, eligible to United States citizenship? To this question counsel has not addressed himself.

The burden of counsel's argument is, and all of the authorities cited by him deal entirely with this Treaty, and the rights of aliens admitted thereunder *to remain in this country.* Not one word is said about the right of Chinese citizens admitted to the United States in pursuance of the provisions of the Treaty or the law as to United States citizenship, if such exists, nor does counsel cite any authority to sustain the trial court's order admitting appellee to United States citizenship.

The question indirectly involves the immigration laws, but directly draws in question the proper application of the *naturalization laws*, to those Chinese admitted under the Treaty.

Of course, the Treaty deals with immigration, and the rights of Chinese subjects "whether proceeding as students, merchants, or from curiosity, to-

gether with their body and household servants and Chinese laborers who are now (then) in the United States" to enter and remain here. It nowhere even remotely deals with the subject of *naturalization.*

Their rights, under this Treaty were the subject of inquiry and decision by the United States Supreme Court in 1925 in the case of *Cheung Sum Shee v. Nagle,* 298 U.S. 336, cited in our opening brief.

At the time of that decision Chinese could not enter the United States as *immigrants.* They *were* admitted for an indefinite period as *non-immigrants,* such as students, merchants, or as visitors, and were and still are "allowed to go and come of their own free will and accord" and were "accorded all the rights, privileges, immunities which are accorded to citizens and subjects of the most favored nation," except as later modified by the Convention of 1894, as hereinafter set out herein.

Prior to 1943 there was no immigrant quota for China.

Appellee was admitted in 1927 as the minor daughter of a merchant who was admitted under the Treaty prior to 1924.

Counsel argues at page 5 of his brief that the purpose of the Treaty was to exempt from its limita-

tions all classes of Chinese other than laborers. With this we disagree.

Clearly, the purpose of Article II of the Treaty was to promote trade between China and the United States, and it was therefore agreed between the high contracting parties that "*merchants*" shall "be allowed to go and come of their own free will and accord" and as such "shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation," except as hereinafter noted.

These provisions were construed by the Supreme Court in the Cheung Sum Shee case in 1925 (298 U.S. 336) to include the wives and minor children of such "merchants."

The Treaty with China concluded November 17, 1880, is strictly an immigration treaty. Article I provides:

> "Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall

apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, and immigrants shall not be subject to personal maltreatment or abuse."

A Convention Regulating Chinese Immigration was concluded March 17, 1894, by which immigration of Chinese laborers was prohibited for ten years.

By Article IV of that Convention it was provided:

"In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghaii, sixth year) it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens* * * *"

The Treaty as to Commercial Relations with China was concluded October 8, 1903, and by Article XVII thereof it is provided *inter alia*:

"It is agreed between the High Contracting Parties hereto that all the provisions of the several treaties between the United States and China which were in force on the first day of January, A.D. 1900, are continued in full force and effect, except in so far as they are modified

by the present Treaty or other treaties to which the United States is a party.

"The present Treaty shall remain in force for a period of ten years beginning with the date of the exchange of ratifications and until a revision is effected as hereinafter provided."

Ratifications were exchanged January 13, 1904.

It was during the period subsequent to the ratification of this Treaty that the ancestor of appellee was admitted to the United States under the provisions of Article II of the Treaty of 1880 as a "merchant," which Treaty was expressly continued in effect and by the provisions of Article IV of the Convention with China dated March 17, 1894, regulating Chinese Immigration to the United States the right to naturalization of these "merchants" and as, of course, their offspring coming to the United States under the protection of that Article, was expressly denied by the words "*excepting the right to become naturalized citizens.*"

At page 3 of his brief, counsel "without raising the question of good faith," or "even entertaining an interrogative thought in that direction" says, nevertheless, "it seems strange that after two-thirds of a century of continued recognition of those of appellee's class *as permanent residents*, there should now be selected as the victim of inquiry the appellee."

There is nothing whatever in the position taken by appellant which even remotely suggests the upset of the long-continued recognition of the rights of Chinese Treaty merchants or their offspring. The Treaty makes no provision for *naturalization* of these Chinese citizens. There is no justification for the claim as made by counsel that they were admitted as "*permanent residents.*" The fact is, the Treaty itself and the law provides that the only rights granted are the right of entry "*to go and come as they please.*"

As has been seen, the Convention Regulating Chinese Immigration concluded March 17, 1894, by Article IV clearly negatives the idea that such persons may become "*naturalized citizens,*" which is one of the privileges expressly denied by that convention.

Appellee, herself, is the one who brought about the present inquiry by *seeking citizenship,* apparently conceiving that her long-continued residence in the United States since the passage of the Chinese Exclusion Repeal Act entitled her to United States citizenship. She applied for United States citizenship (one of the privileges expressly denied by the Convention) and at the hearing before a Naturalization Court, the Immigration and Naturalization Service interposed an objection to her naturalization because she belonged to a class not entitled to that privilege under

the naturalization laws of the United States, on the ground that she was not admitted (in 1927) as an immigrant for *permanent residence* in contemplation of either the Immigration or Naturalization laws, but *solely* as the minor daughter of a Chinese "merchant" under the Treaty with China for an *indefinite stay* with the privilege *"to go and come" of (her) own free will and accord."*

The case of *Haff, Acting Commissioner, v. Yung Poy* (from this court), 68 F (2) 203, cited by appellee, was not one admitting to United States *citizenship* a Chinese subject, but *involved deportation* proceedings and can be of no assistance in the consideration of the instant case because *deportation is not here sought*, but rather *"naturalization" prevented*, on the ground that appellee is not eligible to naturalization. She has never qualified for such, as required by either the Immigration Act or the Naturalization laws.

Counsel for appellee seems to infer that every Chinese and their offspring admitted to the United States under the Treaty of 1880 as a *"merchant"* is entitled to the benefit of our naturalization laws, which, of course, is not true. Effect must be accorded the Immigration Act of 1924 and the Nationality Act of 1940 and consideration given the Senate Report No. 535 of the 78th Congress, 1st Session, on the

Chinese Exclusion Repeal Act of 1943 (57 Stat. 600). By this latter Act, Congress merely placed the Chinese on a parity with other racial groups in the future and provided that they should *qualify for naturalizattion* in exactly the same manner as all other foreign applicants and nothing more.

In the Pezzi case (29 F. (2d) 999) cited in our opening brief, the Treaty of Commerce and Navigation with Italy of 1871 (17 Stat. 845) was under consideration. That treaty, like the treaty of 1880 with China, admitted "merchants" for temporary indefinite stay and in referring thereto, the Court said:

> "This treaty (with Italy) defines the status of Italian citizens in the United States and citizens of the United States in Italy (Article I). *It clearly contemplates the temporary stay of the merchants of one country in the territory of the other.* It accentuates the fact that the citizen of the one country is entitled to certain rights and privileges in the other country, including the privilege of being accompanied by wife, minor children, servants, etc., *solely* and *wholly* because such citizen of one country is in the other country temporarily and for no other purpose than to carry on trade."

That is precisely the effect of the treaty with China of 1880.

The Pezzi case involved an Italian woman who originally entered the United States *as a visitor* in 1925 and a year later applied for and was granted a

change in her status, which was granted, and she registered as the wife of an Italian Treaty merchant. She thereupon applied for naturalization, which was denied, the Court stating:

> "Has the petitioner here met the requirements of the law? I think not. The petitioner has no status in the United States, other than being the wife of her husband."

The Treaty with Italy of 1871 (17 Stat. 845) by Article I defines the status of Italian citizens in the United States and citizens of the United States in Italy, and is similar to the treaty with China of 1880 in the respect to "merchants."

The Court, continuing in the Pezzi case, said:

> "It clearly contemplates the *temporary stay* of the merchants of one country in the territory of the other."

In the Cheung Sum Shee case (298 U.S. 336) the Supreme Court said in no uncertain terms:

> "An alien entitled to enter the United States *solely to carry on trade* under an existing treaty of commerce and navigation *is not an immigrant* within the meaning of Act (Sec. 3 (6)) and therefore is not absolutely excluded by Sec. 13."

By being admitted to the United States in 1927 as the minor daughter of a Chinese treaty "merchant," appellee acquired no greater rights to permanent residence than her ancestor. She, like Mrs. Pezzi, has

no status in the United States other than being the wife of her husband.

The Congress, by Sec. 14 of the Immigration Act of 1924, 59 Stat. 669, 8, U.S.C. 215, provided:

> "The admission to the United States of an alien excepted from the class of immigrants by clauses (1), (2), (3), (4), (5), (6), or (7) of Section 3 shall be for such time and under such conditions as may be by regulations prescribed * * *."

We have referred in our opening brief to the Chinese Rules of October 1, 1926, promulgated by the Commissioner of Immigration with the approval of the Secretary of Labor, under authority contained in Section 24, Immigration Act of 1924 (43 Stat. 166, 8 U.S.C. 224).

Such rules and regulations which do not conflict with the Act of Congress or Treaty have the force of law.

Shizuko Kumanomido v. Nagle
(1930) 40 F (2) 42

Because appellee has not, since her admission to the United States as the minor daughter of a Chinese merchant, qualified for naturalization as required by Part 322, Title 8, Code of Federal Regulations, under authority contained in Sec. 327 of the Nationality Act of 1940 (54 Stat. 1150; 8 U.S.C. 727) she is not eligible for naturalization.

The Supreme Court said in *United States vs. Manzi*, (1928), 276 U.S. 463, 467; 48 S. Ct. 328; 72 L.ed. 654:

> "Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant."

There can be no doubt that the appellee herein was admitted to the United States in 1927 as the minor daughter of a Chinese "merchant" who was admitted under the treaty of 1880. The Immigration Act of 1924 was then in full force and effect, as was the Convention Regulating Chinese Immigration of 1894, by virtue of Article XVII of the Treaty as to Commercial Relations with China concluded October 8, 1903, and ratified January 13, 1904, and having seen that by the plain provisions of Article IV of the convention that all privileges concerning the protection of property rights that are given by the laws of the United States to citizens of the most favored nation, "*excepting the right to become naturalized citizens*," were preserved to these treaty traders, it is rather difficult to conceive how appellee may find any comfort in her claim of the right to naturalization under the treaty of 1880.

In view of what the trial court said at R. 36:

"It is conceded by the government that the pe-

> tioner is the wife of an American citizen and entitled to citizenship by virtue of her marriage, understanding of the American government, and attachment to the principles of our Constitution and of our government, provided she is entitled to admission to citizenship by virtue of the nature of her entry into the United States and her father's status. * * *"

It is important that the record be examined to ascertain the nature of the proof respecting the marital status of the appellee, since it appears there is no such proof on this phase as is exacted by law and judicial decision.

Petition of Sam Hoo (1945) 63 F. Supp. 439.

The only evidence offered before the Naturaliza- Court touching the marriage of appellee to an American citizen is contained in the record at pages 29 and 30 as follows:

Q. (by the court) Are you married?
A. Yes, sir.

Q. Where was your husband born?
A. China.

Q. Your husband was born in China?
A. Yes, your Honor.

Q. Is he an American citizen?
A. Yes, your Honor.

Q. When did he become an American citizen?

A. His father was born in Portland, Oregon, and that makes him a citizen.

Q. He is a son of a native born American citizen?

A. Yes, your Honor. (R. 29)

Q. And your husband is an American citizen?

A. Yes, your Honor.

Q. Was your husband an American citizen at the time you married him?

A. Yes, your Honor.

Q. When did you marry him?

A. In 1941 in May.

Q. Where?

A. Reno, Nevada.

Q. Had you ever been married before?

A. No, your Honor.

Q. Had he?

A. Yes.

Q. Have you had any children?

A. Yes; he had.

Q. Have you any children?

A. No.

Q. You have no children?

A. No. (R. 30)

In the cited case (Sam Hoo) District Judge Goodman, in denying the application of Hoo for naturalization said this:

> "The evidence as to the validity of petitioner's California marriage is not 'satisfactory.' Citizenship is not to be bestowed upon an applicant, under section 711 merely by showing that he indulged in a *ceremony* of marriage with an American citizen spouse. The door would be open to fraud and the United States could easily be imposed upon if an applicant under section 711 could rest his case upon a ceremony of marriage and the so-called presumption of validity under California law. Hence it is that the burden of proof never shifts from a petitioner for citizenship to the government."

While this question was not stressed in the trial court in the instant case, it is a matter of vital importance and one not to be lightly brushed aside. So that, should this honorable court, for any reason, determine that the other matters raised on this appeal are without substantial merit the case should nevertheless be sent back to the lower court with directions to set aside its former order and further pursue the question of the legality of the marriage of appellee in the light of the "unsatisfactory" condition of the record in that respect.

Appellee not having cited any authority to sustain

her right to naturalization, and not having argued the point in her brief, it is respectfully submitted that the order of the trial court was erroneous, should be set aside and the trial court directed to enter an order denying the petition of appellee.

Respectfully submitted,

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JOHN E. BELCHER,
Assistant United States Attorney.